The U.S. Supreme Court and the 2020 Election

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As Election Day looms, Americans are heading to the polls, and they are also heading to the courts. In the past two weeks, the U.S. Supreme Court has issued rulings in five challenges to election-related practices in different states, and there are surely more to come. The litigation has exposed disagreements on the high court, and on lower courts as well, about where responsibility lies for ensuring elections play out fairly and in accordance with law. Of all of the opinions flying around, the one to get the most attention is perhaps a concurrence from Justice Kavanaugh that invokes *Bush v. Gore*, in which the Court stopped a recount in Florida and thereby decided the outcome of the 2000 presidential election. What is more, Justice Kavanaugh cited the Rehnquist concurrence in *Bush v. Gore* for one of the most controversial propositions in that most controversial of cases: that *federal* courts should act to keep *state* courts from depriving state *legislatures* of their constitutional role in presidential elections.

One of the reasons elections seem to breed litigation in the United States is the decentralized way in which they are organized. The date of the presidential election is set by federal law, but the details are left to the states, and practices vary substantially from one state to the next, with mail-in balloting allowed in some places but not others, different voter ID requirements in different states, and so on. COVID-19 has introduced a new source of chaos this year, as some states adapt their rules, for instance, by extending the deadline for receipt of absentee ballots in light of an anticipate surge in mailed ballots that could overwhelm the U.S. Postal Service.

The predominance of state law in election rules has profound implications for the role of courts in election disputes. The U.S. Supreme Court is the supreme authority on *U.S.* law—that is, national law: the Constitution, treaties, federal statutes and regulations. When it comes to questions of state law, the U.S. Supreme Court and lower federal courts take a backseat to the courts of the several states. It is an essential feature of American federalism that state courts have the final word on questions of state law.

This is one of the reasons why *Bush v. Gore* was such a shocking decision—and one the Supreme Court has been eager to put behind it. In 2000, Florida's Supreme Court had ordered a vote recount in three counties on the basis of Florida election law. A bare majority of the U.S. Supreme Court ordered a stop to the recount in a *per curiam* opinion. It did so on the grounds that the Florida Court's open-ended recount instructions did not guarantee the kind of non-arbitrary treatment of voters required by the Equal Protection Clause of the Constitution's Fourteenth Amendment. In other words, the Court did manage to ground its ruling in federal law—the constitutional right to equal protection—but the rationale was transparently shoddy and out-of-

keeping with existing equal protection doctrine. The Court started distancing itself from *Bush v. Gore* before the ink was dry. The opinion announced that the ruling was "limited to the present circumstances," making *Bush v. Gore* the Decision that Must Not Be Named.

A concurrence penned by Chief Justice Rehnquist and joined by Justices Scalia and Thomas went farther than the majority. Article I, section 1, clause 2 of the U.S. Constitution provides that each state will appoint presidential electors in the manner that the state legislature directs. Florida's legislature has provided a detailed statutory scheme to govern presidential elections. Yes, state courts are the final authorities on what state law requires. But in these circumstances, a misapplication of state election law by Florida's Supreme Court could rise to a constitutional violation, if the state court is in effect usurping the legislature's responsibility for setting election rules. Accordingly, Rehnquist interpreted the state election law himself, and concluded that the Florida Supreme Court had gotten it wrong.

In his concurrence last week to a denial of an application to vacate an appeal court's stay of a trial court's order in *Democratic National Committee v. Wisconsin State Legislature*, Justice Kavanaugh cited favorably to the Rehnquist opinion, distilling it to the principle that "the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws." It is curious that Kavanaugh mentioned the opinion at all, given its irrelevance to the matter at hand, a ruling by a *federal court* extending an absentee voting deadline. By raising, in a footnote, the idea of the Supreme Court second-guessing state court rulings on questions of state election law in a case not presenting that issue, Kavanaugh seemed to be laying the groundwork for returning to the idea in a case where it does matter.

Others on the Court have taken up the argument since, but not in sufficient numbers to swing the outcome of a case. Justice Gorsuch (joined by Justice Alito) made the same point in a dissent from an order denying a stay in litigation from North Carolina. And Justice Alito (joined by Justices Thomas and Gorsuch) similarly accused the Pennsylvania Supreme Court of "squarely alter[ing] an important statutory provision enacted by the Pennsylvania legislature" in a dissent from a denial of expedited review of the state court ruling. The idea has also gained traction in the lower federal judiciary. By a vote of 2 to 1, a panel of the Eighth Circuit Court of Appeals found that an extension of the absentee ballot deadline in Minnesota, through a consent decree approved by a state court between the Secretary of State and a class of voters, undercut the state legislature's role in presidential elections.

It is not entirely without precedent for the U.S. Supreme Court to review state courts' application of state law—after 230 years, it seems that almost everything has happened once or twice—but it is extraordinarily rare, and to date has occurred only in extraordinary circumstances. As Justice Ginsburg explained in her *Bush v. Gore* dissent, the Supreme Court has overruled state courts on state law issues only a handful of times, when federal rights were dependent on state law rulings and where those rulings were utterly devoid of support in the applicable law. It is no accident that most of the few examples come from the Civil Rights Era, when state courts nakedly manipulated state law in an effort to undermine federal rights.

The view that any effort to move a statutory deadline or relax a statutory requirement amounts to “rewriting” the law, unconstitutionally shifting power from the legislature to the court, resonates with a textualist and formalist approach to statutory interpretation. This method of reading statutes is widely shared among conservative jurists but by no means universal in the American bar or bench. Under the less formalist approach obtaining on many state supreme courts, adapting election rules in light of unforeseen and extraordinary circumstances can be considered consistent with the legislative scheme taken as a whole.

The Supreme Court Justice who has been most attuned to the difference between the role of state courts and federal courts in reviewing state election rules has been Chief Justice John Roberts. He has consistently upheld state court rulings on election procedures, and consistently rejected changes introduced by lower federal courts. Judging by his lack of dissents—these cases have reached the Court as emergency applications, and the Court does not release the vote counts with its orders—it seems he may have been on the winning side every time. But the moment may pass. The Court has been short-handed since the death of Justice Ruth Bader Ginsburg, and when the new ninth Justice, Amy Comey Barrett, begins ruling, the Court’s center of gravity is expected to shift right.

If we are lucky, the United States will avoid another *Bush v. Gore*, where the Supreme Court steps in after the election to say who has won. But it is 2020, so it seems like a bad idea to count on our luck. It is worth keeping in mind that, even if the Supreme Court does not step in after the election, it has been drawn into the thick of it already, issuing rulings on voting practices in several crucial states. Whatever the outcome on Tuesday, the Supreme Court may have already had a hand in shaping it.
